IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 22ND NOVEMBER 2006 / 1ST AGRAHAYANA 1928

CRL.A.No. 495 of 1998()

CC.892/1994 of JUDL.MAGISTRATE OF FIRST CLASS COURT, PAYYANNUR

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PETITIONER/COMPLAINANT:

C.VASU,AGED 48 YEARS, S/O.KUNHAMBU,
CHANDRATHIL HOUSE, P.O.THAVEM, CHERUKUNNU,
KANNUR DISTRICT.

BY ADV. SRI.SASINDRAN MADAYAMBATHU

RESPONDENT/ACCUSED:

T.SAMUVAL THACHAN,AGED 60 YEARS,
S/O.VADIKKAL MATHAI,NEAR R.C.CHURCH,
MADAYI, KANNUR DISTRICT.

BY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Criminal Appeal.No.495 OF 1998 (C)

Dated this the 22nd day of November, 2006

JUDGMENT

This appeal is filed against the order of acquittal. Appellant filed a complaint under Section 138 of the Negotiable Instruments Act stating that cheque issued for Rs.84,000/- by the accused was dishonored for insufficiency of funds. The complaint was filed after fulfilling statutory formalities. Complainant was examined as PW1. He deposed that accused offered visa to the complainant's brother and extracted Rs.45,000/-. Visa provided was found to be bogus and brother of the complainant was put in jail in Gulf. Later he returned home. He approached the accused and dispute was settled by executing cheque for Rs.84,000/-. Ext.P1 is the cheque which was dishonored for insufficiency of funds. According to the complainant he has given only Rs.45,000/- for assuring visa to his friend. Another Rs.45,000/- is from a friend of the complaint for arranging another visa. It is stated that Rs.84,000/- is inclusive of travelling expenses of his brother and

compensation amounting to Rs.48,000/-. DW1 daughter of the accused was examined to prove that such a settlement was executed and cheque was issued on coercion. The court found that even though execution of the cheque was admitted it was not proved that cheque was issued in discharge of a legally enforceable liability. According to the learned counsel for the complainant the presumption under Section 139 applies here as the execution of cheque is admitted. But as held by the Supreme Court in **M.S.Narayana Menon @ Mani v. State of Kerala (2006 (6) S.C.C. 39)** the presumption under Section 139 is only a rebuttable presumption. Here evidence of the complaint itself shows that only Rs.45,000/- was given for visa to complainant's brother. Amount said to have been given by Raveendran, a friend of complainant for arranging the visa is not due to complainant. The amount claimed to be due is different from the amount mentioned in the cheque. Perhaps as a result of a settlement, cheque was issued, the civil case may lie but in a criminal complaint under Section 138, it is to be established that the cheque was issued in discharge of a legally enforcable debt or liability. Here version of the accused

was also believed by the court that cheque was issued due to coercion. The deposition of the complainant itself shows that cheque was issued not in discharge of a legally enforceable debt or liability. Thus rebuttable presumption under Section 137 was shattered. The view taken by the court below is a possible view. Trial court has taken a possible view while acquitting the accused. In this connection I also refer to the decision of the Apex Court in **M.S.Narayana Menon @ Mani v. State of Kerala (2006 (6) S.C.C. 39) (supra).** There is no perverse finding or patent error of law. Hence appeal is dismissed.

J.B.KOSHY, JUDGE

prp

J.B.KOSHY

Criminal.Appeal.495 OF 1998

JUDGMENT

22nd November, 2006